Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC ERNDT,
INTERNATIONAL CASTING SUPPLY, INC.,
BODO MORGENSTERN,
SHELLCAST FOUNDRIES, INC,
AND INTERBOCO INDUSTRIES,

Petitioners,

vs.

PRE-VEST, INC.,
and
CONLEY CASTING SUPPLY CORP.

Respondents.

On Petition to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a diversity action, is a post- judgment order pursuant to Rule 59(e), Fed. R. Civ. P., allowing amendment of a complaint to allege new jurisdictional allegations immediately appealable under 28 U.S.C. §1291 where the District Court previously: entered judgment that it lacked subject matter jurisdiction on the identical factual record and pleadings, dismissed the complaint, and dismissed and terminated the action?

2. Must the United States Court of Appeals for the Sixth Circuit assert jurisdiction to review the District Court's jurisdiction to make the challenged post-judgment order under the law enunciated in *Phillips v. Negley*, 117 U.S. 665 (1886) where:

(a) the District court previously adjudicated that it was never vested with subject matter jurisdiction over the action; and,

(b) the District court previously terminated and dismissed the action and dismissed the complaint?

PARTIES TO THE PROCEEDING

The Petitioners are Eric Erndt ("Erndt"), Bodo Morgenstern, International Casting Supply, Inc., Shellcast Foundries, Inc., and Interboco Industries, Inc. Eric Erndt is a "stateless citizen" of the United States of America domiciled in Canada. Bodo Morgenstern is a Canadian citizen. International Casting Supply, Shellcast Foundries, Inc., and Interboco Industries, Inc. are Canadian corporations located in Montreal, Quebec. Petitioners are defendants-appellants below. For brevity, the Petitioners will be referred to collectively as "Erndt, et. al."

Respondent Conley Casting Corporation ("Conley") is a Rhode Island corporation located in the State of Rhode Island. Conley is a defendant-appellant below.

Respondent Pre-Vest, Inc. ("PVI") is an Ohio corporation located in Euclid, Ohio. PVI is plaintiff-appellee below.

RULE 29.1 STATEMENT

Petitioner Eric Erndt is an individual and is a citizen of the United States of America but not a citizen of any of the several States. Petitioner Bodo Morgenstern is a Canadian citizen. Petitioners Shellcast Foundries, Inc., Interboco Industries, Inc., and International Casting Supply, Inc. are Canadian corporations. None of the corporate petitioners have parent corporations, affiliates or wholly owned subsidiaries.

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC ERNDT,
INTERNATIONAL CASTING SUPPLY, INC.,
BODO MORGENSTERN,
SHELLCAST FOUNDRIES, INC,
AND INTERBOCO INDUSTRIES,

Petitioners,

vs.

PRE-VEST, INC.
and
CONLEY CASTING SUPPLY CORP.

Respondents.

On Petition to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioners, Eric Erndt, et. al., respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered March 3, 1994 and the order denying the petition for rehearing en banc entered April 29, 1994.

CITATIONS TO OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Sixth Circuit entered March 3, 1994 is printed in the Appendix to this Petition at pages A3-A5. The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc is printed in the Appendix at pages A1-2

The decisions of the United States District Court for the Northern District of Ohio are printed in the Appendix at pages A6 -13.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered March 3, 1994 and the Petition for Rehearing was denied April 29, 1994.

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C §1254(1).

JURISDICTION BELOW

Jurisdiction in the District Court was based solely on diversity of citizenship jurisdiction under 28 U.S.C. §1332 (1976). Appellate jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 28 U.S.C. §1291 (1982).

STATUTES INVOLVED

The federal statutes involved and to be considered are:

28 U.S.C. §1291 (1982):

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdicition of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the

> District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT UNDER SUPREME COURT RULE 29(.4)(B)

In this case the constitutionality of an Act of Congress has not been questioned.

STATEMENT OF THE CASE

On November 23, 1988 Respondent Pre-Vest, Inc. (PVI) filed a Complaint alleging diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332(a) (1976) as the sole basis for jurisdiction. Specifically, ¶7 of PVI's Complaint states:

> Jurisdiction is based upon diversity of citizenship (28 USC 1332(a)). Pre-Vest is a corporation incorporated under the laws of the state of Ohio and neither of the corporate defendants are incorporated nor have their principle (sic) place of business in the state of Ohio and neither of the individual defendants are residents of the state of Ohio and both are believed to be citizens of Canada, the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

The Complaint alleged certain state law claims, namely, misappropriation of trade secrets, violation of Ohio Revised Code §1333.51, unfair competition, conspiracy, tortious interference with a business relationship, conversion and on account. After the District Court ruled on several Fed. R. Civ. P. 12 motions, Petitioners filed their Answer, Defenses and Counterclaims on November 4, 1991.

¶7 of Petitioners' Answer, Defenses and Counterclaims states:

> Denied that diversity of citizenship exists. As to Pre-Vest's citizenship, denied for lack of knowledge. The allegations are admitted as to the corporate defendants. Admitted that the defendants are not residents of Ohio. Admitted that defendant Bodo Morgenstern is a citizen of Canada. Denied that Eric Erndt is a citizen of Canada, as he is a citizen of the United States of America. Denied as to the matter in controversy.
>
> **First Defense**
>
> This court lacks jurisdiction over the subject matter of this action, since Defendant Erndt is a citizen of the United States domiciled abroad, and has been since 1986, and therefore is not a citizen of any state, and was not when this action was filed.

Subsequently, Petitioners moved to dismiss the complaint and the action for lack of subject matter jurisdiction on November 30, 1992. Defendant Conley joined in the motion to dismiss and filed its own motion to dismiss incorporating by reference all of the arguments made by Petitioners.

Petitioners' motion to dismiss was based on the lack of "complete diversity" and indispensability of Erndt. Erndt is a "stateless" citizen of the United States of America and is not a citizen of any of the several states of the United States of America. Erndt is not a citizen of Canada. PVI, despite admitting Erndt's nondiversity, urged the District Court to continue the lawsuit on two alternative theories.

PVI's first theory was that Erndt was not indispensable and that the lawsuit could continue against the remaining defendants despite Erndt's dismissal. PVI's second theory was that the complaint as filed on November 23, 1988 stated a cause of action

under Section 1 of the Sherman Antitrust Act, and, therefore, presented a Federal Question under 28 U.S.C. §1331.

The District Court granted Petitioners' motion to dismiss and entered Judgment January 27, 1993 concluding that the District Court lacked, and was *never vested* with, subject matter jurisdiction (App. A13). The District Court additionally determined that Erndt was an indispensable party under Rule 19, Fed. R. Civ. P., and terminated and dismissed the action (App. A8). The District Court's adjudication of Erndt's indispensability was founded upon the complaint and the record. The District Court concluded that the complaint, which was based upon state tort and statutory law, was aimed primarily toward Erndt. The District Court adjudicated that in equity and in good conscience the action could not continue against Petitioners.

In its memorandum opinion and order, the District Court specifically addressed PVI's alternative theories and concluded that the complaint should be dismissed and that the action should be terminated. The District Court concluded that it was never vested with subject matter jurisdiction after examining PVI's claim that the complaint stated facts sufficient to support a §1 Sherman Antitrust allegation. The District Court made specific findings in regard to the factual insufficiencies of the complaint and stated that it would not claim jurisdiction over the matter by finding a Sherman Act violation where none was alleged (App. A12).

PVI served and filed a motion to amend judgment pursuant to Fed. R. Civ. P. 59(e). PVI's motion to amend judgment was a recapitulation of previous arguments and did not recite any facts or law not previously considered by the District Court. Petitioners opposed the motion to amend judgment on the basis that the District Court never had subject matter jurisdiction.

Without jurisdiction, the District Court granted PVI's motion to amend judgment and ordered PVI to file an amended complaint (App. A6). The order entered April 1, 1993, did not

refer to the judgment of January 27, 1993 which dismissed the Complaint and dismissed and terminated the action. The order did not state the basis for granting the motion to amend other than stating "[u]pon reviewing the motion and the record as a whole" leave to amend is granted. The order was silent as to the District Court's jurisdiction or, more properly, the lack thereof.

Petitioners and Conley appealed the District Court's order of April 1, 1993 to the United States Court of Appeals for the Sixth Circuit. The appeals were dismissed *sua sponte* by the United States Court of Appeals for the Sixth Circuit by an order entered March 3, 1994 for lack of appellate jurisdiction. A petition for rehearing en banc was denied by the United States Court of Appeals for the Sixth Circuit by order entered April 29, 1994 (App. A1).

SUMMARY OF THE ARGUMENT

The instant case before this Honorable Court is believed to be one of first impression. The jurisdiction of the District Court to make a post-judgment order is challenged based on the District Court's adjudication that it was *never vested* with subject matter jurisdiction and its dismissal and termination of the action.

On January 27, 1993, the District Court entered judgment dismissing the complaint, dismissing the action and terminating the action because it was *never vested* with subject matter jurisdiction over the action brought solely upon the diversity statute, 28 U.S.C. §1332 (1976). Inexplicably, on April 1, 1993 the District Court entered an order on motion made pursuant to Fed. R. Civ. P. 59(e) permitting PVI to amend its complaint so as to allege a §1 violation of the Sherman Act.

Erndt, et. al., assert that the order is immediately appealable under 28 U.S.C. §1291 (1982) because the District Court was without jurisdictional power to make any order following: its findings and decision that it was never vested with subject matter

jurisdiction; and, its termination and dismissal of the action. The District Court made the order April 1, 1993 without jurisdiction and, therefore, it must be reviewed by the United States Court of Appeals for the Sixth Circuit under the law enunciated in *Phillips v. Negley*, 117 U.S. 665 (1886).

ARGUMENT FOR GRANTING RELIEF

I. The District Court's Order of April 1, 1993 Is Immediately Appealable Because The District Court Lacked Subject Matter Jurisdiction To Make The Order and Had Dismissed and Terminated the Action and the Complaint.

This Honorable Court in *Phillips v. Negley*, 117 U.S. 665 (1886) enunciated the principle of law that once a Court loses subject matter jurisdiction it is without power to make further orders. Specifically, this Honorable Court stated:

> The vacating of a judgment and granting a new trial in the exercise of an acknowledged jurisdiction leaves no judgment in force to be reviewed. *If, on the other hand, the Order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. emphasis added, Id.* at 671.

The April 1, 1993 order of the District Court is appealable because the District Court was never vested with subject matter jurisdiction of the action and so declared in its judgment entered January 27, 1993 which incorporated its memorandum opinion and order.

Phillips, Id., addressed jurisdiction in regard to "terms" of court. Specifically, if a court vacated a judgment made in a prior term, the order vacating the judgment was void (due to the lack of jurisdiction) unless a motion to vacate judgment was made in the prior term. The rationale of *Phillips, Id.*, was that a Court did not have jurisdiction to modify a judgment in a subsequent

term. The important principle enunciated in *Phillips*, *Id.*, is that a court cannot modify a prior judgment without jurisdiction. The District Court never had jurisdiction over the subject matter and so adjudicated.

Numerous decisions have held orders made without jurisdiction appealable.[1] The modern decisions are not limited to orders made in the improper term, but instead apply the rationale of *Phillips* to all orders jurisdictionally challenged. The instant case before this Honorable Court is believed to be one of first impression wherein the jurisdiction of the District Court to make a post judgment order is challenged based on the District Court's adjudication that it was *never vested* with subject matter jurisdiction.

In, *Jones & Guerrero Co., Inc. v. Sealift Pacific*, 650 F.2d 1072, 1073 (9th Cir. 1981), the Court stated:

> Ordinarily, an Order vacating a previous Order of dismissal is not a "final decision" appealable under 28 U.S.C. §1291 (1976). *Resnick v. LaPaz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961)(Rule 60(b). An exception to this general rule has been recognized to allow an appeal when the District Court is without jurisdiction to enter the Order. See *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 543 (2nd Cir. 1963). We must therefore dismiss Sealift's appeal from the District Court's Order of dismissal *unless the District Court acted without jurisdiction. emphasis added*

The Ninth Circuit dismissed the appeal because the District Court of Guam had not dismissed the action but rather the removal petition. *Id.* at 1074. The Ninth Circuit would have

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[1] See, e.g., *Stradley v. Cortez*, 518 F.2d 488, 492 n.5, (3rd Cir. 1975); *Demertz v. Daniels Motor Freight, Inc.*, 307 F.2d 469, 471 (3rd Cir. 1962); *United States v. Mayer*, 235 U.S. 55 (1914); and *City of Manning v. German Ins. Co.*, 107 F. 52 (8th Cir. 1901).

claimed jurisdiction had the District Court Judge dismissed the action.

The United States Court of Appeals for the Second Circuit has repeatedly applied the rationale of *Phillips v. Negley*, 117 U.S. 665 (1886).[2] In *Thorp v. Scarne*, 599 F.2d 1169 (2nd Cir. 1979), the Second Circuit concluded that an order vacating a notice of voluntary dismissal was appealable. Specifically, the Second Circuit stated:

> The appealability of an Order vacating a notice of dismissal under Rule 41(a)(1) has been squarely upheld in this Circuit. In *Littman v. Bache & Co.*, 246 F.2d 490 (2d Cir. 1957), defendant-appellee moved to dismiss plaintiff's appeal on the ground that the vacatur order was interlocutory. The Court held that although such an Order is "not a final disposition of the action, but reopens the case for consideration upon the merits .... it is settled that .... if the lower court had altogether lost jurisdiction over the action when the Order was entered, an appeal from it will not be dismissed, but will be decided on the merits."[2] 246 F.2d at 492 (footnote omitted), appeal decided on the merits in *Littman v. Bache & Co.*, 252 F.2d 479 (2d Cir. 1958). *See also, Kilpatrick v. Texas & P Ry. Co.*, 166 F.2d 788 (2d Cir.), *cert. denied*, 335 U.S. 814, 69 S.Ct. 32, 93 L.Ed. 369 (1948)(L. Hand, J.)(reversing on appeal district court order vacating plaintiff's notice of dismissal).[3] Because, under the *Littman* formula, the question of our jurisdiction is thus dependent on our determination of the validity of the district court's action, we must of course assert juris-

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[2] *See, e.g., Littman v. Bache*, 246 F.2d 490, 492 (2d Cir. 1957); *Radack v. Norweigan America Line Agency, Inc.*, 318 F.2d 538, 543 n.5 (2nd Cir. 1963); and, *Rinieri v. News Syndicate Co., Inc.*, 385 F.2d 818, 821-22 (2nd Cir. 1967).

> diction in order to make that determination. Cf. *Phillips v. Negley*, 117 U.S. 665, 671-72, 6 S.Ct. 901, 903, 29 L.Ed. 1013 (1886)(if an Order "was made without jurisdiction on the part of the Court making it, then it is a proceeding which must be the subject of review by an appellate court"; "the question of our jurisdiction is necessarily included in the question of the validity of the proceeding [below]"). footnotes omitted, *Id.* at 1172.

Other circuits have applied the rationale of *Phillips v. Negley*, 117 U.S. 665 (1886).[3] In the case before this Honorable Court the action was dismissed and terminated. The action was dismissed and terminated because the District Court lacked jurisdiction over the subject matter. In that the action was intentionally terminated and dismissed in the case at bar, the United States Court of Appeals should have asserted jurisdiction.

II. The United States Court of Appeals Should Have Exercised Jurisdiction to Review the District Court's Jurisdicition to Make The Challenged Post-Judgment Order

The dismissal order entered March 3, 1994 by the Sixth Circuit cites *A.D. Weiss Lithograph Co., Inc. v. Illinois Adhesive Co.*, 705 F.2d 249, 250 (7th Cir. 1983) for the proposition that judgments can be set aside in their entirety under Rule 59(e), Fed. R. Civ. P. The use of Rule 59(e) presupposes, however, that the District Court has the power to apply the Federal Rules of Civil Procedure. *A. D. Weiss Lithograph Co., Id.*, involved the dismissal of a complaint, *not the action*.[4]

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[3] *See, e.g., Kanatser v. Chrysler Corp.*, 199 F.2d 610, 615 (10th Cir. 1952) and *Gilliland v. Lyons*, 278 F.2d 56, 57-58 (9th Cir. 1960).

[4] *See, A.D. Weiss Lithograph Co., Id.* at 250, citing *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) which led to the

Phillips v. Negley, 117 U.S. 665, 671-72 (1886) declared that an order challenged as beyond the jurisdiction of the District Court "is a proceeding which *must* be the subject of review by an appellate court." *emphasis added.* This is not to say, of course, that all orders challenged as having been made without jurisdiction must be reviewed by an appellate court. If, during litigation, a party disputes the District Court's jurisdiction over the subject matter, he or she may not arbitrarily seek an interlocutory appeal and disrupt the litigation. However, in the instant case before this Honorable Court, Erndt et. al. seek review of an order challenged as having been made without jurisdiction based upon the District Court's termination and dismissal of the action wherein it adjudicated that it did not have jurisdiction.

CONCLUSION

Erndt. et. al. seek appellate review of the District Court's order entered April 1, 1993 which was issued under Rule 59(e), Fed. R. Civ. P. in view of the specific circumstances of this case. The United States Court of Appeals for the Sixth Circuit did not assert jurisdiction over the appeal as it must. Apparently, the Sixth Circuit did not comprehend the mandatory language of *Phillips v. Negley, Id.* requiring review under the circumstances of this case. Nor did the Sixth Circuit comprehend the distinction between the dismissal of a complaint and the dismissal and termination of an action upon an adjudication that subject matter jurisdiction was lacking.

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promulgation of Rule 59(e), Fed. R. Civ. P. In *Boaz, Id.*, the District Court dismissed the case, not the action, and there had been no prior adjudication that the District Court lacked subject matter jurisdiction.

PRAYER

The Petitioners ask that by Writ of Certiorari the decision below of the United States Court of Appeals for the Sixth Circuit be reviewed, that the decision be vacated as contrary to law, and that the case be remanded to the United States Court of Appeals for the Sixth Circuit for a review of the District Court's jurisdiction to make the order entered April 1, 1993.

Respectfully Submitted,

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ORDER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Entered April 29, 1994)

Appeal Nos. 93-3465,
93-3471

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PVI, Inc.

Plaintiff-Appellee,

v.

ERIC ERNDT, et al.

Defendants-Appellants

CONLEY CASTING SUPPLY CORPORATION

Defendant-Appellant

Before: KENNEDY and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court

/s/_____
Leonard Green, Clerk

ORDER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Entered March 3, 1994)

Appeal Nos. 93-3465, 93-3471

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PVI, Inc.

Plaintiff-Appellee,

v.

ERIC ERNDT, et al.

Defendants-Appellants,

CONLEY CASTING SUPPLY CORPORATION

Defendant-Appellant.

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Before: KENNEDY and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge

This matter comes before the court for consideration of the defendants' responses to this court's May 27, 1993 order directing the defendants to show cause why their appeals should not be dismissed for lack of appellate jurisdiction. The plaintiff has filed a reply to the defendants' responses.

Upon review of the arguments presented, the court concludes that jurisdiction is lacking in these cases. The defendants

seek to appeal an order entered on March 29, 1993, which set aside a previous order of dismissal pursuant to the plaintiff's timely motion to alter or amend judgment under Rule 59(e), Fed. R. Civ. P. The order also grants the plaintiff leave to amend its complaint to state an alternate basis for jurisdiction. Because the order does not end the litigation on the merits it is not immediately appealable. A decision is not final until all matters as to all parties and causes of action have been terminated. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981).

Contrary to the defendants' arguments, we do not find that the district court exceeded its jurisdiction in granting the relief requested by plaintiff. A timely motion to alter or amend judgment under Rule 59(e) may properly be used to set aside a judgment in its entirety. *See A. D. Weiss Lithograph Co., Inc. v. Illinois Adhesive Co.*, 705 F.2d 249, 250 (7th Cir. 1983). In addition, there is "no absolute prohibition against asserting another basis for jurisdiction in an amendment to a pleading, provided that such jurisdiction would have existed at the time the complaint was originally filed." *Berkshire Fashions, Inc. v. M. C. Hakusan II*, 954 F.2d 874, 887 (3rd Cir. 1992). *See also Kelly v. Kentucky Oak Mining Co., Inc.*, 491 F.2d 318 (6th Cir. 1974); *Sims v. Mercy Hospital of Monroe*, 451 F.2d 171 (6th Cir. 1971); *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467 (6th Cir.) *cert. denied* 379 U.S. 831 (1964); *John M. Peters Constr. Co. v. Marmar Corp.*, 329 F.2d 421 (6th Cir. 1964).

As an alternate basis for this court's jurisdiction, the Defendants argue that the March 29 order is immediately reviewable under the collateral order doctrine established by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The jurisdictional issue which the defendants seek to raise may be raised at any stage of the litigation. The district court's order is subject to effective review on appeal from a final judgment and is not reviewable under *Cohen*. Neither is there merit to the

defendants' suggestion that the Court's decision in *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964) supports immediate review in this case. The Gillespie doctrine permits the court of appeals to decide the merits "in certain close cases where finality cannot be conclusively resolved." *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991)(citations omitted). In the present case, the district court's order is not one of marginal finality. The Supreme Court has given a narrow scope to the Gillespie doctrine. "If *Gillespie* were extended beyond the unique facts of that case, §1291 would be stripped of all significance." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30 (1978).

It is therefore ORDERED that these appeals are dismissed *sua sponte* for lack of appellate jurisdiction.

Entered By Order Of The Court

/s/_____
Leonard Green, Clerk

ORDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

(Entered April 1, 1993)
(Filed March 29, 1993)

Case No. C88-4354

PVI, Inc.

Plaintiff,

v.

ERIC ERNDT, et al.

Defendants.

Before Chief Judge Thomas D. Lambros

Plaintiff, Pre-Vest, Inc., on February 5, 1993, filed a motion to amend judgment pursuant to Federal Rule of Civil Procedure 59(e). Defendants oppose the motion. In the motion plaintiff requests leave of the Court to amend its complaint to allege a violation of the Sherman Antitrust Act.

Upon reviewing the motion and the record as a whole, the motion for leave to amend the complaint is granted. This amended complaint shall be filed within 10 days of this Order. Prior to this Court's Memorandum Opinion and Order of January 23, 1993, extensive discovery had taken place, therefore, discovery as to the amended complaint shall be cut-off within 90 days of the filing. In order to make any motions filed at issue by the end of June 1993, motion practice should proceed concurrently with discovery. The case should be ready for trial on September 13, 1993.

IT IS SO ORDERED.

/s/
Thomas D. Lambros
Chief Judge,
United States District Court

AT CLEVELAND, OHIO
DATED: March 29, 1993

JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

(Entered January 27, 1993)
(Filed January 23, 1993)

Case No. C88-4354

PVI, Inc.

Plaintiff,

v.

ERIC ERNDT, et al.

Defendants.

Before Chief Judge Thomas D. Lambros

In accordance with this Court's Memorandum Opinion and Order of this date, defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction is granted. Defendant Eric Erndt is non-diverse and absent complete diversity of citizenship or a federal question, this Court cannot retain jurisdiction. Therefore, this action is hereby dismissed and terminated without prejudice.

IT IS SO ORDERED.

/s/
Thomas D. Lambros
Chief Judge,
United States District Court

AT CLEVELAND, OHIO
DATED: January 23, 1993

MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

(Filed January 23, 1993)
(Entered January 27, 1994)

Case No. C88-4354

PVI, Inc.

Plaintiff,

v.

ERIC ERNDT, et al.

Defendants.

Before Chief Judge Thomas D. Lambros

This above-captioned action results from the alleged misappropriation and misuse of trade secrets from plaintiff corporation Pre-Vest by a former employee, defendant Eric Erndt. The complaint, as amended, alleges six causes of action, which includes misappropriation of trade secrets, theft or conversion of a trade secret under Ohio Revised Code §1333.51, unfair competition, tortious interference with business relationship, conspiracy, and conversion. Plaintiff originally sought jurisdiction under diversity of citizenship pursuant to 28 U.S.C. §1332(a).

At the present, defendants move this Court to dismiss the action based on this Court's lack of jurisdiction over the subject matter. More specifically, defendants maintain that complete diversity of citizenship does not exist and the non-diverse party is indispensable to this action. Plaintiff opposes said motion and asserts the non-diverse party is not indispensable and could be severed from the action, thus, creating complete diversity between the remaining parties. Plaintiff also asserts that the com-

plaint sufficiently alleges a federal question; that is a violation of §1 of the Sherman Act. In the alternative, plaintiff requests leave of the Court to allege such a federal question.

On November 23, 1988, plaintiff filed a complaint in this Court against the named defendants. In asserting diversity of citizenship jurisdiction, plaintiff assumed that defendant Eric Erndt was a Canadian citizen. Over four years later, it is now undisputed that Mr. Erndt was not a Canadian citizen, but in fact, was a citizen of the United States of America. It is also undisputed that, with Mr. Erndt as a defendant in the action, jurisdiction cannot be maintained on diversity of citizenship grounds.[1] Plaintiff, however, wishes to maintain subject matter jurisdiction based upon diversity of citizenship by severing Mr. Erndt from the action and proceeding with the other complete diverse defendants. In order to do so, this Court must find that Eric Erndt is a dispensable party to this action.

Parties may be added or dropped by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Fed. R. Civ. P. 21. Therefore, this Court has the authority to dismiss non-diverse dispensable parties from this action. However, to determine the dispensability, or indispensability as the case may be, this Court

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[1] "In order to be a citizen of a state within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the state." *See Newman-Green, Inc. v. Alfonzo-Lorrain*, 490 U.S. 826, 828 (1989) citing *Robertson v. Cease*, 97 U.S. 646, 648-49 (1878); *Brown v. Keene*, 8 Pet. 112, 115 (1834). It may also be said that to be diverse the citizens may be citizens of a state and citizens or subjects of a foreign state. With Eric Erndt not being a citizen nor subject of Canada, nor being domiciled within a state, it is concluded that Mr. Erndt is "stateless" and thus not subject to jurisdiction of the federal courts based on diversity of citizenship grounds. *See Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir. 1990); *Smith v. Carter*, 545 F.2d 909, 911 (5th Cir. 1977); Plaintiff's Memorandum in Reply to Defendant's Motion to Dismiss at 3, 5-7, 13-14, & 19 (filed Jan. 4, 1993).

must look to the factors listed in Rule 19 of the Civil Rules regarding the joinder of parties.[2] If the Court determines that Mr. Erndt, according to the factors in Rule 19(a), should be joined if feasible, but would deprive the court of jurisdiction, then the Court must look to see if "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable" Fed. R. Civ. P. 19(b).

Rule 19(b) sets forth four factors to consider in deciding whether the court should proceed without the person whose joinder is not feasible.[3] It is these factors which lead this Court to conclude that this action should not proceed without Eric Erndt as a defendant. If this Court was to proceed without Eric Erndt, Mr. Erndt and the other defendants could be subject to multiple litigation in other courts, thus incurring risks of inconsistent judgments and multiple recovery. Furthermore, although plaintiff maintains that a judgment will be adequate absent Mr. Erndt and that Mr. Erndt will not be prejudiced by dismissal, this Court will not dismiss or sever from this action a

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[2] A person...shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)

[3] The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping or relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Fed. R. Civ. P. 19(b)

defendant to whom every count of the complaint is aimed, and the only defendant who is alleged to have a confidential relationship with the plaintiff. Therefore, this Court will not drop Eric Erndt from this action as he is indispensable.

Plaintiff also claims that the complaint sufficiently alleges a Federal Question in Count III. If plaintiff is correct in this statement, this Court would be vested with subject matter jurisdiction. Count III of the complaint states,

> 28. The aforementioned conduct by the Defendants as specifically described above constitutes unfair competition as against Pre-Vest.

This Court is not convinced that Count III alleges a violation under §1 of the Sherman Act which provides that,

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal...

Plaintiff is fully capable of alleging statutory violations as evidenced by Count II, which claims a violation of §1333.51 of the Ohio Revised Code. Count III not only fails to mention the Sherman Act, but nowhere in the complaint is interstate commerce or restraint of trade mentioned. Furthermore, unfair competition is a state law claim.[4] Therefore, this Court will not claim jurisdiction over this matter by finding a Sherman Act violation when none is so alleged.

Whether plaintiff should be given leave of Court to amend their complaint to allege such a Sherman Act violation is within the discretion of this Court. If "justice so requires" this Court does have the discretion to allow an amended pleading. Fed. R. Civ. P. 15(a); *See also* 28 U.S.C. §1653. However, this Court

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[4] *See Water Management, Inc. v. Stayanchi*, 15 Ohio St.3d 83, 85 (1984)(unfair competition means the "palming off" of your goods as the goods of another).

finds that the original complaint, in not alleging a federal question and incorrectly alleging diversity of citizenship, never vested this Court with jurisdiction over the subject matter of the action. Therefore, this Court will not grant plaintiff leave to amend this complaint for this Court never properly retained jurisdiction, the action is over four years old, and no recently discovered facts have been uncovered by plaintiff which would maintain a new cause of action. Although this Court is sympathetic with plaintiff's dilemma, it appears that plaintiff will not be without a forum to be heard.[5]

Based on the foregoing reasons, defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction is granted without prejudice. In so granting defendants' motion, the motion to continue the trial and discovery dates is denied as moot.

IT IS SO ORDERED.

/s/_____
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO
DATED: January 23, 1993

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[5] *See* Ohio Revised Code Ann. §2305.19 (Anderson 1991).

FILED
JUL 18 1994
OFFICE OF THE CLERK

No. 93-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC ERNDT,
INTERNATIONAL CASTING SUPPLY, INC.,
BODO MORGENSTERN,
SHELLCAST FOUNDRIES, INC.,
AND INTERBOCO INDUSTRIES,

Petitioners,

vs.

PRE-VEST, INC.,
and
CONLEY CASTING SUPPLY CORP.

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a post-judgment order granting a motion to alter or amend a judgment pursuant to Fed. R. Civ. P. Rule 59 (e) is "final" and thus immediately appealable to the United States Circuit Court of Appeals for the Sixth Circuit under 28 U.S.C.A. § 1291.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The caption of the case in this Court lists all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed.

Respondent Pre-Vest, Inc. ("PVI") is an Ohio Corporation located in Euclid, Ohio. PVI has no parent corporation, affiliates or wholly owned subsidiaries to be listed pursuant to Rule 29.1.

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No. 93-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC ERNDT,
INTERNATIONAL CASTING SUPPLY, INC.,
BODO MORGENSTERN,
SHELLCAST FOUNDRIES, INC.,
AND INTERBOCO INDUSTRIES,

Petitioners,

vs.

PRE-VEST, INC.,
and
CONLEY CASTING SUPPLY CORP.

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pre-Vest, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit entered March 3, 1994 and the order denying the petition for rehearing en banc entered April 29, 1994

JURISDICTION BELOW

Jurisdiction in the District Court was initially based on diversity of citizenship under 28 U.S.C.A. § 1332. The Com-

plaint, as amended without altering the factual allegations, alleges Federal question jurisdiction under 28 U.S.C.A. § 1331(a).

Appellate jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 28 U.S.C.A. § 1291 (1982).

STATEMENT OF THE CASE

A. Summary of the Facts

Respondent Pre-Vest, Inc., is engaged in the blending of materials used by its customers to create ceramic molds for the casting of metals. Petitioner Eric Erndt was a former employee of the Respondent entrusted with confidential and proprietary information including Respondents' formulas which were considered trade secrets. Petitioner International Supply Casting, Inc. is a Canadian entity now employing Eric Erndt in competition with Respondent. Bodo Morgenstern, Shellcast Foundries, Inc., and Interboco Industries are related entities having Bodo Morgenstern as a common denominator.

Following Erndt's departure from Respondent, International Casting Supply, Inc. began manufacturing and selling Respondents' formulas to Respondents' customers. On November 28, 1988 in United States District Court, Northern District of Ohio, Eastern Division, respondent initiated an action for conspiracy and theft of trade secrets.

B. Procedural History

On November 23, 1988, Respondent, Pre-vest, Inc. ("PVI"), brought this action in the United States District Court for the Northern District of Ohio. The Complaint alleged subject matter jurisdiction based on complete diversity of the parties under 28 U.S.C.A. § 1332. In asserting diversity jurisdiction, PVI believed that defendant Eric Erndt was a Canadian and not a United States citizen. Because Erndt is allegedly a "stateless" citizen of the United States, Petitioners moved to dismiss the

Complaint on November 30, 1992 (more than four years from the start of the action) based on lack of subject matter jurisdiction. Defendant Conley joined in the motion to dismiss. The District Court granted Petitioners' motion and entered a judgment on January 27, 1993.

PVI filed a timely motion to alter and amend a judgment pursuant to Fed. R. Civ. P. 59(e). PVI argued that Section III of its original Complaint implied a Sherman Antitrust Act violation, and as such, the court should acknowledge a Federal question and let the case proceed. The District Court agreed. On April 1, 1993, based on its authority under Fed. R. Civ. P. 59(e), the District Court granted PVI's motion and allowed leave to amend the Complaint to allege a violation of the Sherman Antitrust Act. (*See* Appendix to Petition for Writ of Certiorari, hereinafter referred to as "App.", at A6-7.) No new facts were alleged by PVI. The only change to PVI's Complaint was to add an additional theory of liability based upon the Sherman Antitrust Act.

Petitioners and Conley appealed the District Court's order of April 1, 1993 to the United States Court of Appeals for the Sixth Circuit. The appeals were dismissed sua sponte by the Court of Appeals by an order entered March 3, 1994 for lack of subject matter jurisdiction (*see* App. at A3-5). A petition for rehearing en banc was denied by the Court of Appeals by an order entered April 29, 1994 (*see* App. at A1). Petitioners now ask this Court to review the Court of Appeals' decisions.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present An Important or Novel Question of Law Which Warrants Review By This Court.

Contrary to what Petitioners want you to believe, the Court of Appeals did not address a novel question in dismissing Petitioners' appeal for lack of appellate jurisdiction. Under

U.S.C.A. § 1291, the Court of Appeals has jurisdiction of appeals from all *final* decisions. The appeals at issue were not based on a final decision (*see infra* at p. 7) and, thus, were properly dismissed.

1. **Federal District Courts Can Utilize Rule 59(e) to Review Dismissals Based on Lack of Subject Matter Jurisdiction.**

    a. **No Distinction is Drawn in Rule 59(e)'s Application When Dealing With a Motion to Dismiss Based on Lack of Subject Matter Jurisdiction.**

On January 27, 1993, the District Court granted Petitioners' motion to dismiss the Complaint based on lack of subject matter jurisdiction (*see* App. at A8). Within the ten (10) day time limit provided for under the Federal Rules of Civil Procedure, Respondent filed a motion to alter or amend judgment under Rule 59(e). The proposed amendment did not alter the factual allegations of the original complaint. Respondent simply argued that the facts, as alleged, gave rise to a Federal question, namely, whether Petitioner violated the Sherman Antitrust Act. At that point, the District Court reviewed: i) its judgment, ii) Respondents' Brief in Support of Motion to Amend the Judgement, and iii) the record as a whole, and determined that it had erred in originally granting the motion to dismiss. Thus, it granted Respondent leave to amend the complaint to allege a violation of the Sherman Antitrust Act (*see* App. at A6-7).

Petitioners are attempting to argue that by dismissing the action based on lack of subject matter jurisdiction, the Federal District Court lost its ability to review its judgment under Fed. R. Civ. P. 59(e) (hereinafter, "Rule 59(e)"). This argument is ludicrous and has no basis in law.

The District Court acted within the authority granted to it under Federal Rules of Civil Procedure. Since at least 1946,[1] courts at all levels have been utilizing Rule 59(e) to monitor their judgments and amend or correct them as needed. The Ninth Circuit in *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982), succinctly states that Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process and any motion which enables the trial judge to reconsider the validity of the judgment and to vacate or alter the judgment as he sees fit is valid. Neither the drafters of Rule 59(e) nor the courts interpreting it have drawn a distinction in its application when dealing with a motion to dismiss based on lack of jurisdiction.

b. The Interplay Between Rule 59(e) and Fed. R. App. P. Rule 4(a)(4) Indicates that District Courts Are Intended to Review Their Judgments.

The pertinent portion of Fed. R. App. P. Rule 4(a)(4) (hereinafter "FRAP Rule 4(a)(4)") provides:

> "(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the District Court by any party:... (iii) under Rule 59 to alter or amend the judgment..., the time for appeal for all parties shall run from the entry of the order... granting or denying [the] motion.

The interplay between Rule 59(e) and FRAP Rule 4(a)(4) suggests that District Courts are intended to review their judgments, regardless of whether such judgments are dismissals

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[1] Rule 59(e) was added to Rule 59 by amendment in 1946. The Committee Note of 1946 to added subdivision (e) provides: "This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944), and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry."

based on lack of subject matter jurisdiction. It also addresses the question, at what point is the finality test of 28 U.S.C.A. § 1291 applied for purposes of an appeal from a Federal District Court? The answer is that a post-judgment motion suspends the appealability of the original judgment until a decision is made on the motion. *Smith v. Insurance Co. of North America*, 213 F. Supp. 675, aff'd in part rev'd in part both on grounds (C.A. 6 Tenn) 334 F.2d 673, cert. den. 380 U.S. 915, 13 L. Ed. 2d 801, 85 S. Ct. 895 and later app. (C.A. 6 Tenn) 397 F.2d 889, cert.den. 393 U.S. 1018, 21 L. Ed. 2d 563, 89 S.Ct. 623, *Century Laminating, Ltd. v. Montgomery*, (C.A. 10 N.M.) 595 F.2d 563, cert. gr. 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204, cert. dismissed 444 U.S. 987, 62 L. Ed. 2d 417, 100 S. Ct 516.

This Honorable Court, in *Osterneck v. Ernst & Whitney*, 109 S. Ct. 987 (1989), discussed this interplay and stated that Rule 59(e) and FRAP Rule 4(a)(4) work together to implement the finality requirement of 28 U.S.C.A. § 1291 by preventing the filing of an effective notice of appeal until a Federal District Court *has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment.*

In other words, if a motion to alter or amend a judgment is timely filed, the time to appeal runs from the entry of the order granting or denying such a motion.[2] If the motion is granted, a new judgment (the "New Judgment") is entered, unless the alteration or amendment leaves one or more issues to be determined. *See* 6A Moore's Federal Practice ¶ 59.15[4].

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[2] In order to avoid confusion and to prevent harsh results, the courts have generally held that regardless of its label, any motion made within ten (10) days of entry of judgment which seeks substantive changes in the judgment, will be considered a Rule 59(e) motion which suspends the appealability and, thus, the finality of the judgment. *See* 6A Moore's Federal Practice ¶ 59.12[1], *citing Kladis v. Brezek*, 823 F.2d 1014 (7th Cir. 1987), *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), and *Huff v. Metropolitan*, 675 F.2d 119 (6th Cir. 1981).

The issue of finality is then directed at the New Judgment. If this New Judgment is final, it is subject to appeal to the Court of Appeals, Thus, in the case at hand, the issue become whether the New Judgment, i.e., allowing leave to amend the complaint and denying the motion to dismiss, is a final appealable order. It is a steadfast principal that denials of motions to dismiss, even when based on jurisdictional grounds, are not final, appealable orders.

2. A Denial of a Motion to Dismiss, Even If Based on Jurisdictional Grounds, Is Not a Final Order.

Only "final" orders are appealable to the Circuit Court of Appeals under 28 U.S.C.A. § 1291. Denials of motions to dismiss are not final orders. A timely motion under Rule 59(e) may be used to amend a judgment dismissing a complaint for lack of diversity jurisdiction. Until the District Court denies said motion, an appeal is not ripe. (*See, Miller v. Leavenworth-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378 (10th Cir. 1981).) Furthermore, the trial court must have had jurisdiction to make the order; if not, it was acting without power and was therefore incapable of destroying the finality of its own judgment. (*See Gilliland v. Lyons*, 278 F.2d 56 (9th Cir. 1960).) If the court has no jurisdiction it has no power to enter an order saying so. This would prevent any appeal from a non-existent order. Such an argument is ludicrous.

This Honorable Court in *Catlin v. United States*, 324 U.S. 229 (1944), enunciated this principal and stated, "... denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." 324 U.S. at 236. In addition, the Sixth Circuit has also followed this principal. *See, e.g., Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988) ("[I]t is hornbook law that denial of a motion to dismiss is nonfinal and noncollateral." 846 F.2d at 1039), and *Chereton v. United States*, 256 F.2d 576 (6th Cir. 1958).

B. Petitioner's Reliance on Phillips v. Negley is Blatantly Misplaced.

This Honorable Court's decision in *Phillips v. Negley*, 117 U.S. 665 (1885), and all cases citing to it[3] enunciate the principal that a court cannot set aside or alter its final judgment *after the expiration of the term at which it was entered.* This Honorable Court, citing *Bronson v. Schulten*, 104 U.S. 415, stated:

> "But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision." 117 U.S. at 673.

In the case at hand, we are clearly not concerned with whether or not the Federal District Court for the Norther District of Ohio attempted to alter its judgment *after the expiration of its term.* Petitioners' own Writ states that the order at issue was void unless a motion to vacate judgment was made in the prior term. *See* Petitioners' Writ at p.7. Thus, the District Court's order dismissing the Complaint was not "beyond its control" when Respondent filed its timely Rule 59(e) motion. Thus, *Phillips v. Negley* was incorrectly relied upon by Petitioners. However, even under the principals set forth in that case, Respondent clearly took steps during the term of the court, by motion or otherwise, to set aside the court's judgment.

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[3] *See*, e.g., *United States v. United States*, 38 F. Supp 610 (1941).

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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July 18, 1994